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09 UNITED STATES DISTRICT COURT
10 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

11 TIMOTHY E. SCOTT,

12 Plaintiff,

13 v.

14 NORMAN MALENG, *et al.*,

15 Defendants.

)
) Case No. C06-839-JCC-JPD
)

) ORDER GRANTING ADDITIONAL
) LEAVE TO AMEND COMPLAINT
) AND DENYING PLAINTIFF'S
) MOTION FOR APPOINTMENT OF
) COUNSEL
)
)
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18 Plaintiff is an inmate housed in the Special Offenders Unit of the Monroe Correctional
19 Complex in Monroe, Washington. He is proceeding *pro se* and *in forma pauperis* ("IFP") in
20 an attempt to bring this 42 U.S.C. § 1983 civil rights action against King County Prosecutors
21 Norman Maleng, a deputy prosecutor, and Michael T. Dijulio, a former senior deputy
22 prosecutor. Plaintiff asserts that defendants unlawfully prosecuted and convicted him of three
23 counts of Trafficking in Stolen Property, (former) R.C.W. § 9A.82.50.2, which conviction
24 was later vacated on the prosecutor's motion following the Washington Court of Appeals'
25 decision in *State v. Thomas*, 103 Wn.App. 800, 14 P.2d 854 (2000). Plaintiff complains that
26 his offender score was nevertheless increased despite the vacated convictions. This matter
comes before the Court on the plaintiff's complaint (Dkt. No. 11), plaintiff's second motion

01 for appointment of counsel (Dkt. No. 21), and defendants' motion to dismiss (Dkt. No. 23).
02 After careful consideration of the complaint and motions, supporting materials, governing
03 law and the balance of the record, the Court ORDERS as follows:

04 (1) The Court finds that plaintiff's complaint (Dkt. No. 11) fails to state a claim
05 upon which relief can be granted. Specifically, the merits of plaintiff's argument are either
06 unavailable in or beyond the scope of a § 1983 action.

07 First, plaintiff has named as defendants two governmental actors who enjoy absolute
08 immunity from suit when performing their official role as advocate of the state. *See Imbler v.*
09 *Pachtman*, 424 U.S. 409, 427 (1976) (holding that prosecutors enjoy quasi-judicial absolute
10 immunity when performing functions "intimately associated with the judicial phase of the
11 criminal process").

12 Second, because plaintiff's claim that his offender score was miscalculated and his
13 incarceration continued despite the vacated convictions challenges not the *conditions* of
14 plaintiff's confinement but rather the *validity* of his confinement, this claim must be brought as
15 a petition for a writ of habeas corpus, not as a § 1983 action. *See Preiser v. Rodriguez*, 411
16 U.S. 475, 500 (1973); *Heck v. Humphrey*, 512 U.S. 477, 489 (1994) (holding that a § 1983
17 claim that calls into question the lawfulness of a plaintiff's conviction or confinement does not
18 accrue "unless and until the conviction or sentence is reversed, expunged, invalidated, or
19 impugned by the grant of a writ of habeas corpus."). Where, as here, a prisoner challenges the
20 fact or duration of his confinement, his federal remedy is a writ of habeas corpus, to which the
21 exhaustion requirement applies. *Young v. Kenny*, 907 F.2d 874, 875 (9th Cir. 1990), *cert.*
22 *denied*, 498 U.S. 1126 (1991).¹ Accordingly, plaintiff's complaint, in its current form, fails to

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24 ¹ In order for this Court to have personal jurisdiction over a § 2254 petition, a petitioner
25 must name the state officer having custody of him as the respondent to the petition. *Rumsfeld v.*
26 *Padilla*, 542 U.S. 426, 434-35 (2004); *Stanley v. California Supreme Court*, 21 F.3d 359, 360 (9th
Cir. 1994) (citations omitted); *see also* Rules Governing Section 2254 Cases in the United States
District Courts 2(a). For inmates, this person is typically the warden of the facility in which the
petitioner is incarcerated. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996); *Stanley*, 21
F.3d at 359.

01 state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6).


02 (2) Plaintiff, however, is GRANTED LEAVE TO AMEND his complaint in order
03 to lodge a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. **Plaintiff shall**
04 **file his amended complaint by October 30, 2006.** The amended complaint must be filed
05 under the same case number as this one, and will operate as a complete substitute for, rather
06 than a mere supplement to, the existing complaint. *See Ferdik v. Bonzelet*, 963 F.2d 1258,
07 1262 (9th Cir. 1992) (internal citation omitted). **The Court may recommend that**
08 **defendants' motion to dismiss (Dkt. No. 23) be granted and the complaint dismissed if**
09 **plaintiff fails to comply with this Order.**

10 (3) For reasons similar to those stated above, plaintiff's second motion for
11 appointment of counsel (Dkt. No. 21) is DENIED. Pursuant to 28 U.S.C. § 1915(e)(1), this
12 Court has the discretion to appoint counsel for indigent litigants who are proceeding IFP.
13 *United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir. 1995). However,
14 the Court will appoint counsel only on a showing of "exceptional circumstances." *Id.*; *Wilborn*
15 *v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). "A finding of exceptional circumstances
16 requires an evaluation of both the likelihood of success on the merits and the ability of the
17 plaintiff to articulate his claims *pro se* in light of the complexity of the legal issues involved."
18 *Wilborn*, 789 F.2d at 1331 (internal quotations omitted). These factors must be viewed
19 together before reaching a decision on a request for counsel under § 1915(e)(1). *Id.*

20 Plaintiff has failed to demonstrate that exceptional circumstances warrant the
21 designation of counsel at this time. Not only is plaintiff unable to offer evidence suggesting
22 that his § 1983 case is likely to succeed on the merits, but as explained above, the action fails
23 to state a claim upon which relief can be granted. Furthermore, although the inadequacy of
24 plaintiff's complaint suggests that he has difficulty articulating his claims, the Court cannot
25 conclude that an appointment of counsel is appropriate at this time.

26 (4) The Clerk is directed to send a copy of this Order to plaintiff and to the
Honorable John C. Coughenour.

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02 DATED this 27th day of September, 2006.

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05 JAMES P. DONOHUE
06 United States Magistrate Judge
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